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In The

Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, ALLEN D. BROWN, DENNIS H. DAUGS, GREG HAYES, and L. DIAN MAXWELL,

Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, in her official capacity as President of the Legal Foundation of Washington; and GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, and CHARLES Z. SMITH, in their official capacities as Justices of the Supreme Court of Washington,

Respondents.

On A Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

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INTERESTS OF THE AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as amicus curiae in support of Petitioner. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 205,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. Protecting our members' fundamental constitutional rights, particularly involving questions of takings and just compensation, has long been an integral part of our activities.

NAHB has been before the Court as an amicus curiae or as "of counsel" to the landowner in a host of critical takings cases. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at*

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[1] Pursuant to Rule 37.6 of this Court, amicus states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

Monterey, Ltd., 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, et al.*, 122 S. Ct. 1465 (2002).

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Ninth Circuit has muddled this Court's most clearly enunciated rule on the taking of property – that a taking requires the payment of just compensation. Mixing elements of physical and regulatory takings precedents, the Ninth Circuit opinion turns upside down this clear rule, requiring the calculation of just compensation before finding the existence of a Fifth Amendment takings claim. This Court must clarify that, no matter what other remedies may also be available, a taking requires – at a minimum – the payment of just compensation.

ARGUMENT

I. WHENEVER A GOVERNMENTAL BODY TAKES PROPERTY – ANY PROPERTY – THE REQUIREMENT THAT JUST COMPENSATION BE PAID IS AUTOMATIC.

There are many issues of law and public policy implicated by this case that will be presented to this Court in both written and oral argument. This brief focuses on only one – that just compensation is the remedy when private property is taken by a governmental entity.

While this proposition of law is neither novel nor controversial, the Ninth Circuit's opinion confuses this simple issue. Instead of embracing the simple equation that a taking requires just compensation, the Ninth Circuit instead implied the reverse - that unless there is unequivocal proof of the amount of just compensation required, there can be no taking. "[E]ven if the IOLTA program constituted a taking of . . . private property, there would be no Fifth Amendment violation because the value of their just compensation is nil." *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 864 (9th Cir. 2001). This misstatement of law effectively turns takings law upside down, requiring a calculation of just compensation before a Fifth Amendment taking can be found to exist.

This Court's takings jurisprudence completely contradicts this convoluted reasoning.

The language of the Fifth Amendment prohibits the "tak[ing]" of private property

> for "public use" without payment of "just compensation." As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has already suffered a constitutional violation, and " 'the self-executing character of the constitutional provision with respect to compensation,' " (citations omitted) is triggered. This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a "taking,"compensation must be awarded.

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 654 (1981)(Brennan, J., dissenting).

Justice Brennan's eloquent dissent, which but for procedural questions would have been a majority opinion with the addition of Justice Rehnquist, became this Court's official majority position six years later.

> Th[e] basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation." (citation omitted).

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314 (1987).

The *First English* majority went on to note that, "[this] Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution." *First English*, 482 U.S. at 316.[2]

Size of the compensation owed for a taking is also irrelevant to finding the existence of a taking. While noting that forced placement of cable television equipment on apartment buildings might have "only minimal economic impact on the owner," this Court in *Loretto* still required a remand for calculation of just compensation.[3]

Nor does the form property takes affect the rule that a taking requires the payment of just compensation. While real property is often the subject of takings claims, this Court has recognized that other property – including money – is subject to takings claims. For example, this Court in the *Phillips* case found "that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal."[4]

That the same underlying principles of constitutional law are applied whether real or monetary property is at issue should not be a subject for debate in this case. It is the application of those principles to the facts that is the focus of disagreement here. Still, no matter what takings analysis this Court decides to apply, it should include the premise that a taking requires just compensation.

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[2] The Court went on to cite the following cases in support of this proposition: *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 (1984); *United States v. Causby*, 328 U.S. 256, 267 (1946); *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 304-306 (1923); and *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893).

[3] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

[4] *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998).

This approach should apply no matter what other legal remedies – in addition to just compensation – this Court may find available, as the remedy of just compensation must not be divorced from the finding of a taking.

This simple proposition of law must also not be caught up in a debate over the IOLTA program at the center of this case. If this Court finds that a taking exists, just compensation must be the remedy. "As Justice Holmes aptly noted more than 50 years ago, 'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'" *First English*, 482 U.S. at 321 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). And as this Court noted in *Loretto*, takings may be found "without regard to whether the action [which created the taking] achieves an important public benefit."[5]

[5] *Loretto*, 458 U.S. at 434-35.

CONCLUSION

For the reasons stated above, the National Association of Home Builders respectfully requests that this Court clarify the opinion of the United States Court of Appeals for the Ninth Circuit by underscoring that a taking requires just compensation.

DATED: August 22, 2002

Respectfully submitted,

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